

Issue: Group II Written Notice (failure to follow established written policy);
Hearing Date: 06/15/05; Decision Issued: 06/17/05; Agency: VSP; AHO:
David J. Latham, Esq.; Case No. 8085



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8085

Hearing Date: June 15, 2005
Decision Issued: June 17, 2005

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Representative for Agency
Four witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for failure to follow applicable established written policy.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Virginia State Police (VSP) (Hereinafter referred to as “agency”) has employed grievant for 12 years; he is a senior trooper.

Agency policy states that “The VCR recorder (both audio and video) shall be turned on when the sworn employee first suspects a driver/person(s) is committing a violation and turned off when the driver is arrested or released.”³ Policy also provides that troopers must “submit a Preliminary Investigative Report (SP-102) upon ... engaging in the ... disposal of chemical/explosives.”⁴ “The purpose of form SP 102 is to collect statistical information and provide a record of complaints received and investigations conducted by sworn employees of the department.”⁵ Such reports are also sent to federal agencies for statistical purposes and could be utilized in unknown criminal activity investigations of which the trooper is unaware at the time of the seizure. “An Inventory of Property Acquired form (SP-165) ... must be prepared as soon as possible for each item of property acquired, regardless of where the item is stored or whether or not the item is ever brought to the office.”⁶ “The preferred method of disposal of all classes of fireworks is by burning. This provides the best way to ensure total consumption of the items to be destroyed.”⁷

At 12:22 a.m. on May 31, 2004, grievant initiated a traffic stop of a vehicle that was exceeding the posted speed limit. Grievant activated his Video Incident Capture System as he pulled the vehicle to the side of the highway.⁸ When the two occupants of the vehicle opened a window, grievant detected the odor of marijuana. Grievant asked each occupant to exit the vehicle and he handcuffed them. During a search of the vehicle’s trunk, grievant found seven bags of fireworks, most of which were explosive devices and, therefore, illegal in Virginia.⁹ He searched a suitcase and found a significant quantity of marijuana,

¹ Agency Exhibit 12. Written Notice, issued March 8, 2005.

² Agency Exhibit 12. Grievance Form A, filed March 28, 2005.

³ Agency Exhibit 1. Section III.B, Memo 2000 - No. 5 (revised) December 1, 2000.

⁴ Agency Exhibit 3. Item 25, General Order No. 25, *Investigation Criminal/Non-Criminal*, revised October 1, 2003.

⁵ Agency Exhibit 5. *Criminal and Administrative Investigative Reports (BFO)*, revised November 1, 2001.

⁶ Agency Exhibit 6. Item 6, General Order No. 43, *Property Management; Found, Recovered and Evidentiary Property; Evidence Security; Inventory; and Seized Assets*, revised April 1, 2005.

⁷ Agency Exhibit 8. Memo – 1987 - #4, *Fireworks Disposal Policy*, May 28, 1987.

⁸ The Video Incident Capture System includes a camera mounted near the windshield of the trooper’s vehicle and a remote microphone located on the trooper’s utility belt. The trooper is able to turn the microphone on or off from his belt; the camera continues to record the incident on videotape until the trooper returns to the vehicle to turn it off.

⁹ Va. Code § 59.1-142.

scales, and other trafficking paraphernalia. At this point, grievant advised both subjects that they were under arrest. Subsequently, after a canine unit was called to thoroughly search the vehicle, the suspects were transported to a regional jail. Grievant confiscated the marijuana and associated paraphernalia, as well as the explosive fireworks and placed them in his vehicle. He charged the suspects for the marijuana offenses but not for fireworks possession.

The videotape entered into evidence is helpful in many respects but not probative of every issue because: 1) the incident occurred at night, 2) the tape is very grainy, 3) a suspect standing in front of the police cruiser blocked some of what occurred and, 4) during the first half of the incident, grievant's microphone sporadically cut on and off. The malfunction was caused by a low battery. At 15 minutes into the stop, grievant discovered a large quantity (seven grocery bags) of fireworks in the vehicle's trunk. At 16 minutes, he discovered a significant quantity of marijuana in a suitcase. Grievant states that he told the suspects at this time that they were under arrest and would be going to the regional jail; however, this cannot be heard on the tape because the microphone had again cut off. At 21 minutes into the stop, he discovered scales and other marijuana trafficking paraphernalia in a suitcase. Shortly thereafter, the audio portion of the recording went totally silent and remained off for the next 18 minutes.¹⁰

At 1:00 a.m., 37 minutes into the stop, the audio portion of the tape comes on again and grievant is heard interviewing one of the suspects about how he came into possession of the marijuana. Three minutes later, in response to a question from the suspect, grievant explained the process of taking them before a magistrate and thence to jail. At 1:09 a.m., grievant was conversing with both suspects in a very casual manner. He then turned his microphone off and simultaneously looked directly at the camera.

Grievant completed a property inventory form (SP 165) for the marijuana and associated paraphernalia. He did not complete such a form for the confiscated fireworks because he was tired at the end of a long shift and "just didn't like being bothered with it." He considered the marijuana seizure much more important than the fireworks seizure. He kept the fireworks in his vehicle for about two weeks after which he placed most of them in a large barrel which he filled with water to let them soak and thereby be rendered harmless.¹¹

The suspect who had admitted to ownership of the fireworks was incarcerated from May 31 until July 12, 2004. Upon his release, he filed a complaint with the agency alleging, inter alia, that grievant had stolen his fireworks.¹² Shortly thereafter, grievant asked his sergeant to witness disposal of

¹⁰ Agency Exhibit 2. Videotape of grievant's traffic stop, May 31, 2004.

¹¹ Agency Exhibit 9. P. 10, Investigative Report, December 20, 2004.

¹² Agency Exhibit 9. Memorandum from first sergeant to captain, October 28, 2004. [NOTE: The agency subsequently conducted a criminal investigation regarding allegations made by the suspect against grievant. The investigation exonerated grievant of any criminal wrongdoing.]

a small quantity of fireworks. Grievant said that some of the fireworks had apparently spilled out of the bags while in his trunk and he had just discovered them. He disposed of the remaining fireworks by placing them in a dumpster while his sergeant witnessed the disposal.

Grievant was disciplined for failing to submit a preliminary investigation report (SP102) regarding the fireworks, failing to submit an inventory report for the fireworks (SP 165), disposing of the fireworks in a manner inconsistent with established written policy, and turning his microphone off in violation of written policy.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹³

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct

¹³ § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Department of State Police has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department.¹⁴ Group II offenses include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal from employment. Failure to comply with applicable established written policy is one example of a Group II offense.¹⁵

Charges against grievant

The agency has demonstrated by a preponderance of evidence, and grievant has admitted, that he failed to submit a preliminary investigation report (SP102) regarding the fireworks, and failed to submit an inventory report for the fireworks (SP 165). Grievant has also acknowledged that he knew that he could have charged the suspect and, he knew of the requirements to complete the required paperwork. Grievant's explanation for not charging the subject was that he considered the fireworks to be a minor violation in comparison with the marijuana charges. His explanation for failure to complete the paperwork is that he was too tired at the end of the shift and didn't want to be bothered with it. However, grievant candidly acknowledged that there was no reason that he could not have completed the requisite paperwork the following day. Accordingly, the evidence is sufficient to conclude that grievant failed to comply with established written policy.

Grievant also forthrightly acknowledged that he did not dispose of the fireworks by burning. The established written policy does not mandate that fireworks be burned; rather it states that burning is the "preferred" method of disposal. Such language leaves open the possibility that other methods of disposal may be acceptable.¹⁶ Thus, grievant's destruction of the fireworks by soaking in water is a method not excluded by the policy. However, grievant subsequently disposed of the remaining small quantity of fireworks merely by throwing them in a dumpster. Placing fireworks in a dumpster does not constitute destruction. It is entirely within the realm of possibility that fireworks thrown in a dumpster could be discovered by a passerby, trash removal personnel, or people at the landfill. The language and intent of the policy make

¹⁴ Agency Exhibit 10. General Order No. 19, *Separation from the Service and Disciplinary Measures*, Revised April 1, 2005.

¹⁵ Agency Exhibit 10. Section 13.b.(1), *Ibid.*

¹⁶ Where the language of a written document is subject to interpretation, any ambiguity must be construed against the author (in this case, the agency). The word "preferred" must be interpreted according to the standard dictionary definition, i.e., it means that burning is the "best" method of disposal, as the policy states in the very next sentence. The policy does not state that burning is the *only* method allowed. If the agency intended that burning should be the only acceptable method, it could have written the policy to so state.

clear that proper disposal of fireworks means either total destruction or rendering the fireworks harmless. Grievant failed to accomplish this objective when he threw fireworks in a dumpster.

The tape recording of the incident corroborates grievant's assertion that he experienced difficulty with the microphone during the traffic stop. The microphone cuts on and off so often, and in such a randomly sporadic manner, that it is obvious that equipment malfunction – not human operation – was the cause. The audio portion was silent for 18 minutes after the scales and trafficking paraphernalia was found. There is no evidence that grievant turned his microphone off during this time. If, as appears to be the case, the battery was low, it would not be unusual for it to stop functioning for a period of time and then come on again later. When grievant turned his microphone off and looked at the camera (46 minutes into the stop), the suspects were already under arrest.

The agency argues that the policy requires that *both* video and audio must be turned off at the same time when the driver is arrested or released. It further argues that it was grievant's failure to turn off the video when he turned off the audio that warranted discipline; had he turned both off at the same time, he would not have been disciplined for this charge. If the first sentence of the policy's Section III.B is read out of context, one might conclude that the both should be turned off at the same time. However, the very next sentence in the policy states "The audio may be used to interview the suspect after an arrest and during the transport of arrested persons."¹⁷ This sentence makes clear that there are situations when it is not necessary to have both camera and audio on at the same time. The agency was not able to explain what harm occurred from having the video on after grievant turned off the audio. In addition, the policy also provides that "The VCR will be used for: 3. Field interviews... and, 8. Any other incident that the operator determines is appropriate."¹⁸ Thus, the policy allows the operator some discretion in determining when to use the equipment. A careful review of the tape in this case does not reveal that grievant abused his discretion.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior *immediately*.¹⁹ When issuing the employee a Written Notice Form for a Group II offense, *management should issue notice as soon as practicable*.²⁰ One

¹⁷ Agency Exhibit 1. Section III.B, Memo 2000 - No. 5 (revised) December 1, 2000.

¹⁸ Agency Exhibit 1. Section II.A, *Ibid*.

¹⁹ Agency Exhibit 10. Section 7.b, General Order 19, *Separation from the Service and Disciplinary Measures*, revised April 1, 2005.

²⁰ Agency Exhibit 10. Section 13.c (1), *Ibid*.

purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. The hearing officer takes administrative notice that unless an extensive, detailed investigation is required, most state agencies issue disciplinary actions within days or, at most, a few weeks after commission of an offense.

The agency has promulgated a policy regarding the conduct of administrative investigations that provides that such investigations should be expedited. The policy states that **an investigation shall be completed within 30 days**, unless extenuating circumstances warrant an extension.²¹ In this case, the agency first conducted a criminal investigation because of the allegation that grievant had stolen the suspect's property. That investigation was concluded on September 7, 2004. One month later, on September 20, 2004, the agency began interviewing people for its administrative investigation; the last interview was conducted on October 29, 2004. The investigative report was not submitted until December 20, 2004 – thus, the investigation report was completed 104 days after it was initiated. The agency did not offer any evidence to show that there were any extenuating circumstances that would justify extending the 30-day investigation deadline. Following that, the agency delayed imposition of discipline for an additional 79 days during which time various supervisors reviewed the investigation report. Discipline was finally imposed on March 8, 2005 – more than nine months after the date of offense.

It is understandable that, in this case, the agency felt it could not take disciplinary action until after the criminal investigation had been concluded. It is recognized that criminal charges must take priority and that it would be inappropriate to jeopardize prosecution of a criminal case by taking disciplinary action before the criminal investigation is concluded. However, even after the criminal investigation determined that no crimes had been committed and the investigation was closed on September 7, 2004, the agency failed to take disciplinary action for more than *half a year*. Such an extraordinary delay is contrary to both the Commonwealth's Standards of Conduct and the agency's own written policies (General Orders 17 & 19).

The administrative investigation essentially involved talking with nine persons and all but one of these interviews were completed within approximately three weeks. The agency failed to explain why it took 104 days to issue a report in such a relatively straightforward case. An additional delay of 79 more days resulted from review of the final report by several supervisory personnel. It is understandable (and typical in most agencies) that supervisors, managers, and a human resources representative will be consulted prior to issuance of a disciplinary action. However, such consultation is usually accomplished in a meeting among the relevant persons. The agency has not shown why such consultation should require nearly three months.

²¹ Section 14, General Order No. 17, *Administrative Investigations*, revised April 1, 2004.

When an agency delays imposition of discipline for an extended time, it gives the appearance that the offense is not serious. In an appropriate case, a hearing officer may give consideration to reducing the level of discipline where the agency's delay in the issuance of discipline is sufficiently egregious as to negate the alleged seriousness of the offense.²² A hearing officer may not direct an agency on how to conduct its business, however, when an agency delays the imposition of discipline for an extraordinarily long time, such delay will be considered an extenuating circumstance that can mitigate the level of discipline imposed. The facts in this case dictate that the extended delay in issuance of discipline constitutes such a mitigating circumstance.

Mitigation

General Order 19 provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance.²³ In this case, grievant has both long service and an otherwise satisfactory performance record. In fact, grievant's immediate supervisor testified that grievant is the best performing trooper under his supervision. The agency avers that it took into account grievant's length of service and good performance record in deciding to issue only a single disciplinary action rather than issuing separate discipline for each of the charges against grievant.

However one factor not previously considered is the extraordinary delay in the issuance of discipline. Although the agency has explained the process that resulted in this delay, the fact remains that the agency did not act promptly to issue discipline. Even after the criminal investigation had been closed, the agency took over half a year to issue discipline. Thus, the agency failed to comply with its own policy requiring prompt issuance of discipline. It also failed to comply with a second policy requiring that the administrative investigation be completed within 30 days. The agency seeks to discipline grievant for his failure to comply with established written policy, but in delaying discipline the agency has itself failed to comply with two policies. In the interests of fairness and objectivity, the agency's failure to comply with policy constitutes a condition that compels a reduction in the disciplinary action.

DECISION

²² This principle has been enunciated in several previous decisions involving this agency, viz., Case Numbers 5270 (2001), 5322 (2001), 5335 (2001), 489 (2004), and 7958 (2005). [NOTE: these cases may be accessed on the EDR website at: www.edr.virginia.gov]

²³ Agency Exhibit 10. Section 9, General Order No. 19, *Separation from the Service and Disciplinary Measures*, revised April 1, 2005.

The disciplinary action of the agency is modified.

The Group II Written Notice issued on March 8, 2005 is hereby REDUCED to a Group I Written Notice.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.²⁴ You must file a notice of appeal with the clerk of the circuit court in the

²⁴ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.